

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CYRIAC ABRAHAM,

Plaintiff,

v.

WASHINGTON GROUP
INTERNATIONAL, INC. and
URS CORPORATION,

Defendants.

OPINION AND ORDER

12-cv-198-bbc

Plaintiff Cyriac Abraham has sued defendants Washington Group International, Inc. and URS Corporation for misrepresentation and breach of contract arising out of his former employment with Washington Group. Plaintiff contends that defendants induced him to work for them by lying about the job he would be performing and later breached a contract by failing to pay him a bonus that he had been promised. Jurisdiction is present under 28 U.S.C. § 1332 because there is more than \$75,000 in controversy, dkt. #24, and plaintiff's citizenship (Texas) is different from that of defendants (Delaware, California, Ohio and Colorado). Dkt. #14.

Now before the court is defendants' motion for summary judgment. Dkt. #12. I am granting the motion in full. Plaintiff has failed to raise any genuine factual dispute regarding whether defendants made any misrepresentations or breached any contracts related to his

employment. Rather, the evidence in the record shows that defendants told plaintiff he was being hired at a specific salary to perform scheduling duties and that he was hired at that salary to perform scheduling duties. Thus, there was no misrepresentation. Additionally, the undisputed evidence in the record shows that defendants told plaintiff he might be eligible to participate in a project incentive plan, but ultimately he was ineligible because he terminated his employment before the plan was approved and the project completed. Thus, there was no breach of contract.

PROCEDURAL ISSUES

Before turning the analysis of defendants' motion, a preliminary procedural matter requires attention. Plaintiff did not comply with the court's summary judgment procedures. He received a copy of this court's "Procedures to be Followed on Motions for Summary Judgment" and "Helpful Tips for Filing a Summary Judgment Motion in Cases Assigned to Judge Barbara B. Crabb," which was attached to the pretrial conference order. Dkt. #6. As explained in those documents, a party opposing summary judgment must file a brief with opposing legal arguments, a response to the movant's proposed findings of fact and evidentiary materials to support the factual propositions. Procedure, II.A.; Helpful Tips, no. 2. If the opposing party wishes to dispute a proposed fact, he must state his version of the fact and refer to evidence that supports that version. Procedure, II.B.

Plaintiff did not file any response to defendants' proposed findings of fact and did not file any of his own proposed facts. Although he filed some evidence, including his own

affidavit and some exhibits, it is unclear which facts he disputes and which he believes to be the accurate version of the events relevant to this case. Plaintiff was instructed that “[t]he court will not search the record for factual evidence. Even if there is evidence in the record to support your position on summary judgment, if you do not propose a finding of fact with the proper citation, the court will not consider that evidence when deciding the motion.” Helpful Tips, no. 2. Moreover, as defendants point out, plaintiff’s affidavit contains several vague statements, legal conclusions and statements about which plaintiff would have no personal knowledge, in violation of the federal rules. Fed. R. Civ. P. 56(c)(4) (affidavits used to support or oppose summary judgment “must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.”). Plaintiff made no effort to correct his mistakes even after defendants devoted three pages of their reply brief to the problem. Thus, I am accepting all of defendants’ properly proposed facts as undisputed. Procedure, II.C; Helpful Tips, no. 3 (“A fact properly proposed by one side will be accepted by the court as undisputed unless the other side properly responds to the proposed fact and establishes that it is in dispute”); Hendrich v. Board of Regents of the University of Wisconsin System, 274 F.3d 1174, 1177-78 (7th Cir. 2001) (upholding this court’s local rules adopting moving party’s proposed findings of fact when non-moving part fails to respond properly).

From defendants’ proposed findings of fact, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

Defendant Washington Group was in the business of providing engineering, construction and management services to businesses and governments. (Washington Group no longer exists as a corporation. Defendants point out in their reply brief that URS Energy and Construction, Inc. is the successor in interest of Washington Group, not defendant URS Corporation. However, because I am granting summary judgment to defendants and dismissing all of plaintiff's claims, it is unnecessary to decide whether plaintiff should have named URS Energy and Construction as a defendant. Throughout the remainder of this opinion, references to "defendant" are to Washington Group.) In the mid-2000s, Wisconsin Public Service Corporation hired defendant to manage the construction of the Weston 4 power plan project in Marathon County, Wisconsin. To proceed with construction efficiently, defendant needed to hire a lead scheduler for the project.

In 2004, plaintiff Cyriac Abraham was living in California and working on a short term project in Colorado. Because the job was ending, he began looking for another employment position. Mark Maier, a recruiter employed by ENC Services, called plaintiff and told him about defendant's opening for a lead scheduler on the Weston 4 project. Plaintiff applied for the position with defendant in late April or early May 2004. Shortly after submitting his application, plaintiff had a telephone interview with Bob Villa, a project control manager with defendant. Villa discussed the scheduler position with plaintiff and told him that the compensation would be in the \$90,000 range. After the initial phone interview, plaintiff traveled to Green Bay, Wisconsin to meet with two of defendant's

employees, Chuck Meyer and Lynn Rohrbaugh, the project control manager for the Weston 4 project. During the meeting, plaintiff, Meyer and Rohrbaugh discussed the Weston 4 project generally but did not discuss the duties plaintiff would perform if he was hired. Plaintiff did not receive any documents or written materials during the meeting.

Around the same time, plaintiff applied to Fru-Con Corporation, which offered to employ plaintiff as a project control manager at a salary of approximately \$127,200 a year on a power plant construction project in Sacramento, California. Plaintiff told Maier and Villa that he was going to accept Fru-Con's offer because it was a management position with higher pay and closer to where his family was living in California. In response, defendant raised its offer to plaintiff. Villa called plaintiff back and told him that defendant could offer him a salary commensurate with that of a project control manager, though plaintiff would be performing the duties of a scheduler. Villa told plaintiff that in order to pay him a higher salary, plaintiff would be given the corporate title of project control scheduler, but that plaintiff would be working under the supervision of another manager at the Weston 4 site in performing the scheduling duties. (Around the same time, defendant had given this title to other employees in order to fill positions at higher pay rates.) Neither Villa nor any other employee of defendant discussed any project control manager duties with plaintiff.

Defendant made a formal offer to plaintiff by letter dated May 21, 2004, which stated:

We are pleased to confirm our offer of employment to you with the Washington Group International, Inc. Your title will be Project Control Manager with a monthly salary of \$8,750 and your assignment will be on our Weston Project in Green Bay, Wisconsin. Your start date is scheduled for

June 1, 2004. You will be eligible to a sign on bonus of \$5,000 payable 30 days after your start date. You will also be entitled to participate in our Project Incentive Program at the rate of 10-15% of base salary, once it is submitted and approved.

Dkt. #16-2. Standard employment documents were attached to the letter, but there was no written job description attached. Plaintiff accepted the offer and began employment with defendant on June 1, 2004. Defendant paid plaintiff's relocation and transportation expenses and gave him a lump sum of \$12,500 in conjunction with his move from California to Wisconsin. He was also given a \$5,000 sign on bonus, a monthly salary of \$8,750 and the title of project control manager.

Plaintiff was responsible for scheduling on the Weston 4 project. Approximately one year after he began his employment, May 27, 2005, plaintiff sent Villa an email in which he wrote:

Unfortunately, we both missed or overlooked some points in our earnest desire to close the hiring process speedily, some time in May 04.

- It is a fact that I would not have come to [defendant] if you had not offered a Manager position. I knew the field title was "Lead Project Scheduler."
- You told me there would be a Project Controls Manager. . . . I did not think he was going to get into scheduling and assumed he would leave that to me entirely.

I think, for me to work as a scheduler under the instructions of some one, that stage has past [sic]. If I try to do that, it will be just a misuse of a valuable resource and I will be doing an injustice to the employer and myself. . . . I do not have a problem to accept the leadership [the project control manager] on this project. This is a large project and complex Unfortunately no one has defined what is the scope of my work . . . So I do request you to send me a job description and what you expect me to do.

You have hired me as Project Control Manager at grade 17. But you told me (or did

I misunderstand?) this Wednesday that you had no intention to place me as a Manager. Why? I would request you to look at the corporate HR policy on this position, relevant part of which I have copied and attached for your quick reference. As per this, a [project control manager] at grade 17 “Generally works under the direction of a business unit director, operations manager, regional office manager or project manager.” My situation is very different. Why?”

Dkt. #15-1 at 1.

Villa responded by email, stating,

There is still a misunderstanding or miscommunication between you and I In our initial discussions prior to you accepting [defendant’s] offer, the position I described to you was that of the Lead Scheduler on the Weston 4 project When you accepted our offer, my understanding was (and from our conversation this week you confirmed) that you recognized the position you were being hired for was Lead Scheduler and you would report to the [project control manager]. Because of your experience and capabilities, you were offered a salary that was a grade 17 which has a corporate title of Project Controls Manager. You were hired at the corporate title (and salary) of Project Controls Manager to fill the position of Lead Scheduler. . . .

We do have an organization on the project as you know. Greg is the [project control manager] with full responsibility for the group. But, Cyriac, you are a very important member of the project controls team. . . You have full responsibility for managing the schedule on the project, in itself a major responsibility and one you should not take lightly. A major success factor on the project will be meeting this schedule.

A job description would be helpful for you and you should discuss this with Greg. . . .

Id. at 2. Plaintiff responded to Villa’s email, stating, “I really appreciate your reply. There is nothing in your reply I could disagree with except for the fact that I am not in the loop on many issues where I need to be on this project. I am upset because various discussions have [taken] place without me where schedule inputs were very important. . . . Let us leave this discussion here. Greg may learn the value of delegation, or some day I may be able to move into another project when a suitable opportunity arises. . . .” Id.

In February 2006 plaintiff applied for a position with another company, Noble Environmental Power. That company offered him a position in Connecticut with a compensation package of \$150,000. Plaintiff resigned from defendant voluntarily on February 17, 2006 and accepted a position with Noble Environmental Power. His last day of employment with defendant was March 3, 2006.

The Project Incentive Plan for the Weston 4 project was first approved on September 27, 2006, approximately seven months after plaintiff resigned from his employment with defendant. It was completed in 2008. During the entire time plaintiff worked for defendant, defendant had “Project Incentive Plan Instructions/Guidelines” in effect which stated that “[p]articipants must be actively employed at time of project completion in order to receive a payout. . . .” Dkt. #16-1. The guidelines provided that “[i]n the event a participant is terminated prior to project completion/performance year end, for any reason other than retirement, disability or death, all incentive awards shall be forfeited to Washington Group without payment to the participant.” Id.

OPINION

A. Misrepresentation Claims

Under Wisconsin law, a plaintiff may bring a tort claim for misrepresentation to induce commencement of an employment relationship. Mackenzie v. Miller Brewing Co., 2001 WI 23, ¶ 18 n. 15, 241 Wis. 2d 700, 623 N.W.2d 739; Bellon v. Ripon College, 2005 WI App 29, ¶ 6, 278 Wis. 2d 790, 693 N.W.2d 330. Plaintiff contends that defendant

induced him into accepting its offer of employment and rejecting the offer from Fru-Con by misrepresenting to him that he would work as a project control manager with management duties. He asserts three claims for misrepresentation against defendants: negligent misrepresentation, intentional misrepresentation and strict responsibility misrepresentation. The three types of misrepresentation share three common elements: (1) the representation must be of a fact and made by the defendant; (2) it must be untrue; and (3) the plaintiff must believe the representation to be true and rely upon it to his detriment. Whipp v. Iverson, 43 Wis. 2d 166, 169, 168 N.W.2d 210, 203 (1969). See also Lewis v. Paul Revere Life Insurance Co., 80 F. Supp. 2d 978, 995 (E.D. Wis. 2000). There are differences among the three types of claims, but I need not address them because plaintiff has not adduced evidence to satisfy these basic elements.

Plaintiff has not shown that defendant made any false representation of fact. Plaintiff contends in his brief that defendant told him that he was being hired to perform management duties on the Weston 4 project but that once he was hired, he was performing only scheduling duties. However, plaintiff proposed no findings of fact to support the arguments he makes in his brief. As noted above, plaintiff's failure to put any facts into dispute means that I must accept all of defendants' proposed facts as true. Under the undisputed facts as proposed by defendants, the only possible inference I can draw is that plaintiff was offered a scheduling position for which he would be classified as a project control manager in order to pay him a higher salary.

Defendants produced ample evidence to support the drawing of such an inference,

including Villa's and plaintiff's deposition testimony. Both plaintiff and Villa testified at their depositions that defendant needed a lead scheduler for the Weston 4 project and that plaintiff was recruited and interviewed for that position specifically. Plt.'s Dep., dkt. #17, at 66, 260; Villa Dep., dkt. #18, at 37-38, 45-46, 48. At the time he was being recruited, plaintiff was aware that there already was a project control manager overseeing the project because he met with the current manager during his interview in Green Bay. Plaintiff testified that the only information he received about his anticipated job duties before he accepted defendant's offer was Villa's verbal description of the scheduling duties he would perform on the Weston 4 project. Plt. Dep., dkt. #17, at 260. Villa testified that he told plaintiff explicitly that plaintiff would be performing the duties of lead scheduler, not project control manager, even though he would have the corporate title of project control manager. Villa Dep., dkt. #18, at 45-46. Plaintiff's offer letter said that he would have the "title" of project control manager, but did not state that he would be performing the duties of a project control manager.

The May 2005 email conversation between plaintiff and Villa also supports defendant's version of events. During the email exchange, Villa reminded plaintiff that he had been hired to perform scheduling duties on the project and work under the direction of a project control manager. Villa also reiterated that plaintiff had been given the corporate title of "project control manager" in order to provide him a higher salary and benefits. Plaintiff expressed his frustration at being denied management responsibilities and independent control over scheduling, but conceded during the exchange that he knew he had

been hired to perform scheduling duties and that he would be working under a manager on the project.

Plaintiff attempts to create a genuine factual dispute regarding whether defendant made a false representation to him about his job duties by asserting in his affidavit that he received two documents from defendant containing written descriptions of the duties he believed he would be performing as a project control manager. Dkt. #19 at ¶ 15. As discussed above, I am disregarding the assertions in plaintiff's affidavit for his failure to comply with this court's procedures. Moreover, even if I were inclined to consider plaintiff's affidavit, I would reject his assertions about receiving a written description under the "sham affidavit" rule. Under this rule, a deponent may not use an affidavit sworn to after a deposition to contradict deposition testimony without giving a credible explanation for the discrepancies. Cleveland v. Policy Management Systems Corp., 526 U.S. 795, 806 (1999); Stinnett v. Iron Works Gym/Executive Health Spa, Inc., 301 F.3d 610, 615 (7th Cir. 2002); Bank of Illinois v. Allied Signal Safety Restraint, 75 F.3d 1162, 1170 (7th Cir. 1996). Although post-deposition testimony should be excluded only if it is inherently inconsistent and squarely contradicts previous testimony, those criteria are met in this case. Plaintiff testified on at least four occasions during his deposition that he never received any written description of the job duties he would be performing before he started working for defendants. Plt.'s Dep., dkt. #17, at 97-98, 130, 259, 260. His assertion now that he received written descriptions on two occasions is a bald contradiction of his previous sworn testimony. Further, plaintiff makes no attempt to explain why he did not mention these

documents during his deposition except to say that he “forgot” about them. Plt.’s Aff., dkt. #19, at ¶ 16. Id. This is not sufficient. He does not clarify when he received the documents, who provided them, in what context he received them or even where he found them. Id. He has provided no fax, email or letter showing receipt of the documents or other correspondence of any kind showing that he received the documents. He has not disputed the testimony of defendants’ employees who deny providing him a written description, and he also does not explain why he asked Villa for a written description of his job duties in May 2005 if he had received a description already. In light of these deficiencies, the sham affidavit rule applies.

Plaintiff has identified no other evidence to support his claim that defendant made untrue statements of fact regarding its offer of employment to plaintiff. Accordingly, plaintiff has failed to raise any genuine factual disputes and defendants are entitled to summary judgment on plaintiff’s misrepresentation claims.

B. Contract Claim

Plaintiff asserts two breach of contract claims against defendants. First, he contends that defendants breached a contract with him by hiring him as a project control manager and failing to give him corresponding duties. This claim fails for the same reasons plaintiff’s misrepresentation claims fail. Plaintiff has identified no contract, oral or written, in which defendant promised to give plaintiff specific job duties that were different from those to which plaintiff was assigned. Defendants are entitled to summary judgment on this claim.

Second, plaintiff contends that defendants breached a contract with him by failing to pay him the project incentive bonus that was promised in the offer letter he received. However, even if the letter created a contract between plaintiff and defendant, plaintiff has adduced no evidence to show that defendant breached the contract. The offer letter stated only that plaintiff would be entitled to participate in the project incentive program once it was submitted and approved. However, plaintiff does not deny that the project incentive program was not submitted or approved until after he resigned. Additionally, he does not deny that defendant's policies governing its incentive plans included a specific provision that participants had to be actively employed in order to receive a payout. Thus, plaintiff forfeited his eligibility to an incentive bonus under the project incentive plan by resigning voluntarily from defendant before the completion of the Weston 4 project. Defendants are entitled to summary judgment on plaintiff's breach of contract claims.

ORDER

IT IS ORDERED that the motion for summary judgment filed by Washington Group International, Inc. and URS Corporation, dkt. #12, is GRANTED. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 26th day of March, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge